2012 IL App (1st) 101684-U

SIXTH DIVISION
March 30, 2012

No. 1-10-1684

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 03 CR 19342
	)	
BIBIANO RUANO,	)	Honorable
	)	Maura Slattery-Boyle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Robert E. Gordon and Justice Palmer concurred in the judgment.

O R D E R

¶ 1 *Held:* Judgment affirmed where circuit court properly granted State's motion to dismiss defendant's post-conviction petition because his claim was barred by the doctrine of *res judicata*; mittimus corrected.

¶ 2 Defendant Bibiano Ruano appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). He contends that the mittimus should be corrected to reflect the court's oral pronouncement, and that he made a substantial showing of ineffective assistance of trial counsel.

¶ 3 This court previously affirmed defendant's bench convictions of first degree murder, attempted murder, and three counts of aggravated battery, and his aggregate sentence of 38 years' imprisonment. *People v. Ruano*, No. 1-06-1251 (2007) (unpublished order under Supreme Court Rule 23). The trial evidence showed that in the evening of June 25, 2003, Gabriel Vazquez was driving in his van with the deceased, Eluterion Hernandez, and sisters Anaceli and Edith Rojas when defendant hit their van with the vehicle he was driving. Defendant then flashed a gang sign at them while his passenger pointed a gun at Vazquez, who, fearing that he would be killed, quickly drove away. Defendant, however, pursued them, hitting Vazquez' van multiple times over a course of two miles. The pursuit ultimately concluded with Vazquez' van crashing into a light pole, killing Hernandez and causing injuries to Vazquez and the Rojas sisters.

¶ 4 In the direct appeal, defendant argued, in relevant part, that the State failed to prove him guilty beyond a reasonable doubt where the physical evidence demonstrated that he was in front of the victims' van at the time of the crash, and thus Vazquez merely needed to stop his van to avoid the collision. *Ruano*, order at 8. In finding that the evidence was sufficient to sustain defendant's convictions, this court noted that:

> "[N]o matter where defendant's van was at the exact point of impact, *i.e.*, in front of Vazquez's van, behind Vazquez's van or crashed into the third green van, defendant caused Vazquez's van to hit the light pole by viciously pursing it for approximately two miles until he finally succeeded in running it off the road." *Ruano*, order at 8-9.

¶ 5 This court also rejected defendant's argument that he lacked the specific intent to kill Vazquez, as demonstrated by the extended chase, and the intervening green van which ultimately caused the crash. *Ruano*, order at 9. In doing so, this court observed that defendant threatened

Vazquez and his passengers by hitting their van and then waving gang signs, while pointing a handgun in their direction, and then continuing to hit their van seven times over the course of two miles. *Ruano*, order at 9. This court explained that defendant's repeated actions did not diminish his intent, but, rather, strengthened it where he continuously pursued the victims despite Vazquez' escape attempts, and that the existence of the third green van did not lessen his culpability whatsoever. *Ruano*, order at 9.

¶ 6 Defendant subsequently filed a post-conviction petition through counsel in June 2008, alleging that his appellate counsel provided ineffective assistance in failing to argue on appeal that defendant's convictions for attempted murder and aggravated battery of Vazquez violated the one-act one-crime rule. In April 2009, defendant filed an amended post-conviction petition through counsel. In this petition, defendant alleged that his trial counsel was ineffective for failing to present at the sentencing hearing "expert testimony" disputing the trial testimony of the major accident investigator Fronczak and suggesting a lesser culpability for defendant. He noted that Investigator Fronczak's trial testimony supported the conclusion that his vehicle struck Vazquez' vehicle immediately before the crash, but maintained that his counsel should have provided, in mitigation at his sentencing hearing, expert testimony to the contrary. Defendant specifically alleged that his conduct would be less culpable for purposes of sentencing if the evidence showed that his vehicle did not strike the victims' vehicle immediately before it crashed into a light pole. He maintained that it could be inferred that Vazquez swerved off the road and struck the light pole in an attempt to avoid a collision between his van and a third vehicle. In support, he attached the report of Mechanical Engineer John Goebelbecker whom he alleged found that the paint transfer evidence testified to by Fronczak was inconclusive. The report discusses the colors of the paint transferred to the vans driven by Vazquez and defendant.

¶ 7 The State filed a motion to dismiss defendant's amended post-conviction petition alleging that defendant's claims were barred by *res judicata* and waiver. The State explained that defendant's claim that another vehicle was involved which caused the "accident" was previously addressed at trial, posttrial and on direct appeal and rejected. The State explained that the trial court rejected trial counsel's arguments that defendant "unfortunately" rear ended a third vehicle which caused Vazquez to strike defendant's vehicle, then swerve off the road into a pole, and that defendant's culpability was minimized by Vazquez driving at excessive speeds and failing to take the appropriate evasive action to avoid the collision between defendant and the third vehicle. The State also noted that posttrial, defendant was represented by different counsel who argued that the ultimate crash was caused by a green van and also ineffective assistance of trial counsel, and that the trial court rejected these arguments. The State emphasized that the issue raised by defendant has been raised multiple times and rejected by the trial and appellate courts, and therefore, it is barred by *res judicata* and waiver. The State concluded by noting that defendant failed to state a cognizable claim of ineffective assistance of trial counsel where he failed to show how the expert's testimony would have even been allowed at sentencing, and that there was a reasonable probability that he would have received a lesser sentence, where the trial and appellate courts have found the issue of whether a third green van was involved irrelevant.

¶ 8 Defendant filed a response to the State's motion to dismiss alleging that his claim was not precluded by *res judicata* or waiver. He conceded that he previously argued that Vazquez' vehicle crashed in an effort to avoid a collision with a third vehicle, but maintained that he "never previously made the argument he is making in" his amended post-conviction petition, namely, that he should receive a shorter sentence because he did not drive his car into the Vazquez vehicle immediately before the fatal crash. Defendant further maintained that the State failed to provide any supporting law for its claim that the expert testimony would be inadmissible at the

sentencing hearing, that the sentencing court may consider all the surrounding circumstances in choosing an appropriate sentence, which included whether his car struck the Vazquez vehicle immediately prior to the crash. Defendant also claimed that there was a reasonable probability that he would have received a shorter sentence had the evidence stated in Goebelbecker's affidavit been presented at sentencing.

¶ 9 The trial court granted the State's motion to dismiss defendant's post-conviction petition. In doing so, the court noted that the appellate court found that trial counsel did not act in an ineffective manner, and whether another car was involved was not really the issue as it was the cumulative acts leading up to the crash which were so egregious or disconcerting for the court to impose the sentence that it did. The court explained that defendant failed to make a substantial showing of a constitutional violation where the evidence showed that he chased Vazquez at length, hit his car multiple times, and waved gang signs, and that in light of this evidence, whether a third vehicle was involved was irrelevant to defendant's culpability. The court also noted that "[n]one of the case law that [has been] presented indicates *** putting an expert on at the sentencing stage, but rather at the trial stage."

¶ 10 On appeal, defendant contends that he did not abandon the issue in his initial petition that his convictions for attempted murder and aggravated battery of Vazquez violated the one-act one-crime rule, and that if this issue was abandoned, his post-conviction counsel provided unreasonable assistance in doing so. The State responds that the trial court had merged the two convictions in question, and thus, the only remaining issue was that the mittimus should be corrected. Defendant replies by requesting this court to correct the mittimus, after arguing again that he did not abandon the one-act one-crime issue. Alternatively, defendant argues that post-conviction counsel provided unreasonable assistance.

¶ 11 We simply observe that the oral pronouncement of the judge is the judgment of the court, and the written order of commitment is merely the evidence of that judgment. *People v. Jones*, 376 Ill. App. 3d 372, 395 (2007). When the two conflict, the oral pronouncement prevails. *Jones*, 376 Ill. App. 3d at 395. Accordingly, pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we correct the mittimus to reflect that aggravated battery merged with attempted murder of Vazquez (*People v. McCray*, 273 Ill. App. 3d 396, 403 (1995)). In light of this finding, defendant's remaining contentions on this issue are rendered moot. *People v. Boyd*, 363 Ill. App. 3d 1027, 1030 (2006).

¶ 12 Defendant next contends that he made a substantial showing of ineffective assistance of trial counsel based on counsel's failure to present at the sentencing hearing mitigating expert evidence on the role of the third vehicle in the fatal crash. He maintains that the expert evidence would have shown that the fatal crash was an accident in that defendant hit a third vehicle and Vazquez, in an attempt to avoid that collision, crashed into a light pole.

¶ 13 A defendant is not entitled to an evidentiary hearing unless the allegations set forth in his petition, as supported by the trial record or affidavits, make a substantial showing of a constitutional violation. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). In making that determination, all well-pleaded facts in the petition and affidavits are to be take as true; however, nonfactual and nonspecific assertions which merely amount to conclusions are insufficient to require a hearing under the Act. *Rissley*, 206 Ill. 2d at 412. On appeal, we review *de novo* the circuit court's decision to dismiss defendant's post-conviction petition without an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 14 In determining whether defendant presented a substantial showing of ineffective assistance of trial counsel to warrant further proceedings under the Act, we are guided by the standard set forth in *Strickland*. *People v. Morris*, 335 Ill. App. 3d 70, 78 (2002), citing

Strickland v. Washington, 466 U.S. 668 (1984). Under that standard, defendant must establish that counsel's performance fell below an objective standard of reasonableness, and prejudice such that but for the deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694.

¶ 15 Defendant claims that his trial counsel was ineffective for failing to present, at the sentencing hearing, mitigating expert evidence. He maintains that the expert evidence would have shown that a third vehicle was involved which led to the accident and fatal crash, and thus, his culpability was "lesser" as he was not responsible for the ultimate fatal crash. The State responds that this issue is *res judicata* and waived because it was previously raised on direct appeal.

¶ 16 Defendant argued on direct appeal that the evidence was insufficient to prove his intent where there was allegedly a third vehicle involved, namely, a green van, which caused Vazquez' van to swerve and ultimately hit a pole. This court held that whether a third vehicle was involved was irrelevant to defendant's culpability. *Runao*, order at 9. Defendant may not evade the operation of *res judicata* and waiver by now couching his claim in terms of ineffective assistance or by "rephrasing" his claim regarding his culpability and the role of the third vehicle as only applying to the sentencing stage. *People v. Williams*, 186 Ill. 2d 55, 62 (1999).

¶ 17 In addition, under the two-pronged standard for stating a claim of ineffective assistance of trial counsel, defendant cannot demonstrate prejudice from defense counsel's alleged deficiency unless the underlying claim is meritorious. *People v. Childress*, 191 Ill. 2d 168, 174 (2000). Here, the underlying claim is not meritorious. As noted previously by this court on direct appeal, whether the third van was involved did not lessen defendant's culpability as his intent to kill was shown by his pursuit of the victims at a high speed for two miles, and ramming their vehicle with his multiple times as they attempted to flee from him (*Ruano*, order at 8-9); accordingly,

defendant failed to make a substantial showing of ineffective assistance of trial counsel for failing to present the alleged expert evidence regarding his culpability. We, therefore, conclude that the circuit court did not err in granting the State's motion to dismiss.

¶ 18 In light of the foregoing, we order the mittimus corrected as instructed, and affirm the judgment of the circuit court of Cook County.

¶ 19 Affirmed as modified.